



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2180 OF 2015**

*(Before Hon. Justice Dr. Jacob Gakeri)*

**NDUNG’U KIARIE.....CLAIMANT**

**VERSUS**

**WEITHAGA FARM EXTENSION LIMITED.....RESPONDENT**

**JUDGMENT**

1. By a memorandum of claim dated 2<sup>nd</sup> December 2015 and filed on 9<sup>th</sup> December 2015, the Claimant sued the Respondent alleging unlawful/unfair dismissal from employment and non-payment of terminal dues and compensatory damages.

2. The Claimant prays for –

(a) A declaration that the Respondent’s actions amount to unlawful and unfair termination from employment.

(b) A declaration that the Claimant is entitled to payment of his terminal dues and compensatory damages as pleaded

(c) An order for the Respondent to pay the Claimant his due terminal benefits and compensatory damages amounting to Kshs.1,175,641.80 as tabulated below:

(i) One month’s salary in lieu of notice Kshs.12,654.90

(ii) House allowance for 18 years Kshs.409,989.60

(iii) Untaken/unpaid leave for 18 years Kshs.227,788.20

(iv) Service/gratuity at 15 days per year for 18 years Kshs.113,894.10

(v) Underpayment from 2010 to 2013 as follows:

May 2010 to April 2011 Kshs.32,688.00

May 2011 to April 2012 Kshs.45,780.00

May 2012 to April 2013 Kshs.61,200.00

May 2013 to April 2014 Kshs.119,788.20

(vi) Compensation for illegal and unfair

dismissal Kshs.151,858.80

(d) Interest on (c) above from the date of filing suit till payment in full

(e) Costs of this suit plus interest thereon.

3. Subsequent to the filing of the suit, the Claimant amended the memorandum of claim with respect to name of the Respondent from Weithaga Estate Limited to Weithaga Farm Extension Limited as well as the Court from Nyeri to Nairobi. The amended memorandum of claim dated 26<sup>th</sup> January 2018 was filed on 26<sup>th</sup> September 2018.

4. The Claimant avers that he was employed by the Respondent from 1<sup>st</sup> June 1994 as a tractor driver at Kshs.200/- per day (6,000/-) per month which was below the statutorily prescribed wage. It is further averred that the Respondent did not remit any NSSF contributions nor did it pay house allowance and did neither proceed on annual leave nor paid in lieu.

5. That on 14<sup>th</sup> October 2014 he was summoned by the Respondent's Manager, one Mr. Michael who informed him that his services had been terminated. No reason was given and efforts to pursue terminal dues fell through.

6. It is averred that termination of employment by the Respondent violated the Constitution of Kenya, 2010, Employment Act, 2007 principles of natural justice and the tenets of fair labour practices.

#### **Respondent's Case**

7. The Respondent filed its reply to memorandum on 16<sup>th</sup> March 2018 denying that it employed the Claimant as a tractor driver on 1<sup>st</sup> June 1994. It also denied that the Claimant was a diligent employee or was underpaid and no NSSF contributions were deducted from the Claimant's pay. It is the Respondent's case that the Claimant declined the deductions being made because of his advanced age. It is averred that the Claimant proceeded on leave when it fell due or on application.

8. The Respondent denies having terminated the Claimant on 14<sup>th</sup> October 2014 but aver that on 14<sup>th</sup> October 2013 the Claimant absconded duty and did not resume which inconvenienced the Respondent for two weeks before a replacement was found.

9. It is further averred that the Respondent had good reasons to dismiss the Claimant but did not do so. That the Claimant had been warned about carrying workers in a trailer as it was not insured for the purpose and denies having terminated the Claimant unfairly.

10. Finally, it denies that the Claimant is entitled to the reliefs sought.

#### **Claimant's Evidence**

11. The Claimant adopted the written statement and was cross examined. The written statement rehashed the averments in the memorandum of claim.

12. On cross examination, the witness confirmed that the employer's business was a coffee farm and coffee is harvested seasonally, typically from October to December and the company would employ casuals to pick coffee. He stated that he was employed as a driver not as a casual worker.

13. The witness stated that in 1994 he was earning Kshs.100/- per day and at the time of dismissal he was earning Kshs.220/- per day and was paid on 15<sup>th</sup> of the month and end month for the days worked.

14. That he was not given a house by the employer and no NSSF deductions were made. He also confirmed that he was terminated at the age of 60. The witness stated that he was 70 years old not 80 as suggested by Counsel. He also told the Court that he was born in 1934 as opposed to 1932 indicated on his identity card.

15. Finally, on re-examination, the witness reiterated the fact that he was employed in 1994, his salary was Kshs.220/- per day, was not given a termination notice, was chased away by Michael on the material date and the employer had his phone number and was aware of his residence.

#### **Respondent's Evidence**

16. RW1, **Mr. Mwangi Gathuri** adopted his statement and was cross examined. He testified that the Claimant was employed as a driver around 2011 before which he was a casual worker picking coffee during the harvesting season or pruning coffee trees. The witness denied that the Claimant was chased away.

17. It was his testimony that the Claimant had a habit of carrying workers on the tractor and had been warned about it severally. That on the day he alleges to have been dismissed, he was called upon to explain his conduct but got annoyed, parked the tractor and walked away and never returned. A replacement was sourced after two weeks.

18. On cross examination the witness confirmed that he was one of the Directors of the Respondent company. That the Claimant was working as a tractor driver but he could not recall his salary/wage. The witness confirmed that the company had staff quarters but the Claimant declined the house allocated to him stating that he preferred living with his family and was therefore not entitled to a house allowance.

19. That the Claimant used to work half day on most days since coffee is harvested in the morning and often proceeded on leave.

20. The witness confirmed that the Claimant was a good driver other than disobeying orders not to carry workers. That he absconded duty and was not disciplined. RW1 confirmed that he did not serve the Claimant with a notice to show cause. Since the Respondent did not have the Claimant's details. That he did not report to work for two weeks.

21. Finally, RW1 told the Court that the Claimant was long past retirement age and did not want any deductions from wage/salary.

### **Claimant's Submissions**

22. The Claimant identifies two issues for determination namely: -

- (i) whether the Claimant's termination of employment was lawful and fair;
- (ii) Whether the Claimant is entitled to the reliefs sought.

23. As to whether the termination of employment was lawful and fair, it is submitted that the Claimant was not issued with a notice to show cause or subjected to a disciplinary hearing. Reliance is made on Section 45(2) of the Employment Act as is the decision in **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the need for substantive justification and procedural fairness for a termination to pass the fairness test. That if the Claimant was guilty of misconduct, he should have been taken through a disciplinary hearing.

24. On the alleged absconding of duty, it submitted that the Claimant reported to work but was chased away by one Mr. Michael. That the Respondent's allegations are false and even if he absconded duty, he was still entitled to a hearing. The decisions in **Felistas Acheha Ikatwa v Charles Peter Otieno [2018] eKLR** is relied upon to buttress the submission.

25. On desertion, the decision in **Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR** is relied upon to urge that desertion must be proved the sentiments of Nduma J. in **Joseph Nzioka v Smart Coatings Ltd [2017] eKLR** are relied upon.

26. Finally, it is submitted that RW1 confirmed that the Respondent made no attempt to locate or contact the Claimant after he absconded duty.

27. On reliefs, it is submitted that the Claimant is entitled to all the reliefs sought, namely notice pay, house allowance, untaken/unpaid leave, service/gratuity, for the years worked, underpayment and compensation for unfair termination.

### **Respondent's Submissions**

28. The Respondent lists three issues for determination:

- (i) Whether the Claimant was employed by the Respondent;
- (ii) Whether the Claimant was terminated and if so whether it was lawful;
- (iii) Whether the Claimant is entitled to the prayers sought.

29. As regards termination of employment, the Respondent states that the Claimant's theory of being summoned and chased away by the Manager had no trigger and he went away and never raised the issue with any one? That RW1 testimony of what transpired on the material day that the Claimant was reprimanded for carrying workers, got annoyed and left sounded more credible. The Claimant abandoned work due to the reprimand and did not report to work for two weeks. It is submitted that the Respondent could not give reasons for a termination that never was. The Claimant disappeared.

30. As regards the date of employment, it is submitted that the Claimant tendered no evidence of the allegation that he was employed in 1994 or was terminated on 14<sup>th</sup> October 2014. That the Respondent adduced evidence that the Claimant was employed as a tractor driver in January 2011 as the muster roll shows and on a need basis.

31. On reliefs, it is submitted that the Claimant is not entitled to any reliefs, that the Claimant adopted the incorrect figure as monthly salary having confirmed that his salary was Kshs.220/- per day, a monthly salary of Kshs.6,600/- and no evidence was adduced to show that it was below the minimum wage. That the wage was negotiated and agreed upon. That the Claimant is not entitled to pay in lieu of notice as there was no termination.

32. On house allowance, it is submitted that the daily wage was negotiated and the Claimant declined the house offered by the Respondent.

33. As regards underpayment, the Respondent urges that the sum of Kshs.220/- was negotiated and cannot thus claim to have been unrepaid.

34. As regards compensation, it is the Respondent's submission that the Claimant has not demonstrated that he was unfairly terminated.

### **Analysis and Determination**

35. The issues for determination are: -

- a) When was the Claimant employed by the Respondent?
- b) Whether the Claimant's employment was terminated by the Respondent or he absconded duty;
- c) Whether the Claimant deserves the prayers sought.

36. As to when the Claimant was employed by the Respondent the Claimant uses 1<sup>st</sup> June 1994 but tendered no scintilla of evidence to establish the same. Incidentally, 1<sup>st</sup> June 1994 was a public holiday and highly unlikely that the Respondent staff were in the office working.

37. The Respondent's muster roll which the Claimant neither contested or faulted nor punctured, shows that the Claimant earned his first wage in July 2010 having commenced work on 21<sup>st</sup> June 2010.

38. There is no evidence of a contractual relationship between the parties before June 2010.

39. Significantly, RW1 confirmed that the Claimant was employed long after attaining retirement age of 60 years. Puzzlingly, the Claimant contested his age. Whereas the identity card shows 1932 as the date of birth, he stated that the correct date is 1934, that the identity card had an incorrect date. That as at the date of hearing, he was 70 years not 80 years yet he was over 80 years on 27<sup>th</sup> January 2022.

40. Assuming that the Claimant was born in 1934, he attained retirement age in 1994, he was therefore a retiree when he was hired by the Respondent whether in 1994 or 2010.

41. Strangely, the Claimant has not produced a single document be it a letter notice or receipt to show that he had any engagement with the Respondent in any way from 1994 or 2010.

42. In the absence of evidence to the contrary, the Court will proceed on the basis of the evidence on record which show that the Claimant was employed by the Respondent as a casual worker from 21<sup>st</sup> June 2010 at a daily rate of 150.

43. As regards whether the Claimant's employment was terminated and whether the termination was lawful, the first landing are the provisions of the Employment Act, 2007 which prescribe the requirements of a lawful termination of an employment contract. While Section 45(2) sets out the essence of substantive justification and procedural fairness in termination of employment, Section 41 of the Act itemises the precepts of procedural fairness.

44. Section 43 prescribes the duty of the employer to establish the reason(s) for termination of employment. Finally, Section 47(5) of the Act sets forth the burden of proof of the employer and employee.

45. These provisions have been elaborated upon and applied in legions of decisions by this Court and the Court of Appeal.

46. The Court of Appeal decisions in **Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR** as well as **Naima Khamis v Oxford University Press [EA] Ltd [2017] eKLR** are spot on the attributes of a fair termination of employment. The cornerstone of a fair termination is invariably a substantive justification and a fair procedure.

47. In the instant case whereas the Claimant alleges that he was unfairly terminated from employment, the Respondent alleges that he absconded duty after he was reprimanded for carrying workers in the trailer of the tractor he was driving, a fact he did not deny. The Claimant's evidence was consistent that he reported to work on the material day and was chased away by one Mr. Michael. The Respondent did not deny it had a manager by that name at the time.

48. Strangely, the date of the alleged termination and absconding of duty are at variance. Whereas the Claimant alleges that it was 14<sup>th</sup> October 2014, the Respondent gave no date. The Claimant furnished no documentary evidence of the date nor did the Respondent.

49. However, the muster roll on record shows that the Claimant was an employee of the Respondent up to and including 20<sup>th</sup> October 2013 and for the month in question he worked for total of 13 days and was paid Kshs.1,222/- after a deduction of Kshs.1,400/- as NHIF. He was paid at the rate of Kshs.227/- on 24<sup>th</sup> October 2013.

50. The Court finds the Claimant's evidence as regards dates unsafe to rely on.

51. According to the Respondent, the Claimant absconded duty on 14<sup>th</sup> October 2013 and the muster roll appears to confirm this contention since the Claimant worked for only 13 days from 21<sup>st</sup> September 2013 to 20<sup>th</sup> October 2013.

52. On allegations of desertion or absconding of duty, in **Felistas Acheha Ikatwa v Charles Peter Otieno (supra)** the Court stated that:

*"The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered."*

53. The decision of Nduma J. in **Joseph Nzioka v Smart Coatings Ltd [2017] eKLR** relied upon by the Claimant adopts a similar position. The employer must demonstrate that reasonable attempt was made to contact the employee and a show cause letter was issued calling upon

the employee to show cause why his services should not be terminated for absconding duty.

54. Instructively, the Respondent testified that it had a good reason to terminate the Claimant.

55. In the instance case the Respondent's submission is that the Claimant absconded duty and was therefore not available to be disciplined and the Respondent had no contact details of the Claimant and no notice to show cause was served. Evidently the Respondent took no step to contact the Claimant and did not act as required by law. It is also noteworthy that the Claimant confirmed on cross examination that the Respondent had his phone number and was aware of his resident.

56. In the premises it is the finding of the Court that the Respondent has failed to demonstrate that the Claimant absconded duty as alleged.

57. Relatedly, it is the finding of the Court that the termination of the Claimant's employment by the Respondent was unfair for want of procedural fairness.

58. Having found that termination of the Claimant's contract of employment was unfair, I now proceed to determine the Claimant's entitlement.

**(a) A declaration is hereby issued that the termination of the Claimant's employment contract was unfair and unlawful.**

**(b) One month's salary in lieu of notice**

59. Having found that the Respondent terminated the Claimant's employment without notice, the Claimant is awarded the equivalent of one month's salary **Kshs.6,152.70**.

**(c) House allowance**

60. The Claimant led no evidence of his entitlement to house allowance. Similarly, his daily wage is presumed to incorporate house allowance.

61. Finally, the Respondent testified that the Claimant was allocated a house but declined on the ground that his desire was to stay with his family. The prayer for house allowance is **declined**.

**(d) Payment in lieu of leave untaken/unpaid**

62. The Claimant led no evidence of his leave entitlement for the duration he was an employee of the Respondent. It is unrealistic in the Court's view that the Claimant did not proceed on leave for 18 years and did not raise the issue or apply and it was denied. He did not explain why he did not proceed on leave. In addition, the Claimant has not enumerated the number of days for which he claims per year.

63. But more significantly, a review of payments made to the Claimant per month for the days worked as he testified and as confirmed by the Respondent show that he worked for between 10 and 16 days with an average of 13 days per month. A few illustrations will suffice:

**From To No. of days**

21/08/2010 20/09/2010 11

21/10/2010 20/11/2010 14

21/02/2011 20/03/2011 10

21/05/2011 20/06/2011 13

21/03/2012 20/04/2012 13

21/10/2012 20/11/2012 13

21/01/2013 20/02/2013 16

21/07/2013 20/08/2013 14

64. From the record, it is discernible that the Claimant was neither expected to report to work on a daily basis nor did he and was only paid for the days actually worked.

65. The data lends credence to the Respondent's testimony that that Claimant was a casual employee hired on need basis and remunerated accordingly.

66. With an average of 13 days working per month, the Claimant did not require any leave from the Respondent. The claim for unpaid or untaken leave is **declined**.

**(e) Service/gratuity calculated at 15 days for every completed year**

67. On cross examination, the Claimant confirmed that he was earning Kshs.220 per day. The Respondent's muster roll shows that he was actually earning Kshs.227/- per day when he was terminated.

68. Although the Claimant testified that he was not employed as a casual, he tendered no evidence to demonstrate the nature of his employment but admitted and confirmed that he was paid at mid-month and end month for the days worked at Kshs.220/- per day. The uncontroverted evidence of the Respondent is that the Claimant was employed by the Respondent long after attaining retirement age and did not wish any monies deducted from his wage.

69. Finally, monies that ought to have been deducted and remitted to NSSF is supposed to be given to the NSSF not the employee. NSSF is the body vested with powers to enforce pension contributions not a court of law.

70. The claim for service/gratuity which are invariably not similar or identical is **declined**.

**(f) Underpayment**

71. As regard underpayment, the Respondent's argument that the Claimant's wage was agreed upon by the parties as confirmed by the Claimant and thus not below the minimum wage is untenable.

72. The Regulation of Wages (Agricultural Industry) Orders promulgated annually by the Cabinet Secretary for Labour pursuant to the provisions of the Labour Institutions Act, decree the minimum wage and employers are bound to act accordingly. In the instant case, the Claimant's wage fell below the prescribed medium wage of a tractor driver in 2012 and 2013.

73. The Respondent's submission that the Claimant failed to demonstrate that his daily wage was below the minimum wage is indefensible. The Claimant is not obligated to prove the law.

74. Under the Regulation of Wages (Agricultural Industry) Orders, 2010 and 2011, the basic minimum consolidated wages for a tractor driver was Kshs.4,242/- per month or Kshs.180 per day in 2010 and Kshs.4,772/- per month or Kshs.202.70 per day in 2011.

75. The Respondent did not underpay the Claimant. However, under Legal Notice no. 70 of 2012, the minimum consolidated wage for a tractor driver was Kshs.5,397/- per month or Kshs.229,25 per day and under Legal Notice no. 196 dated 30<sup>th</sup> July 2013 the minimum consolidated wage was Kshs.6,152.70 per month or Kshs.261.35 per day. The Claimant was underpaid in 2012 and 2013.

76. Having found that the Claimant was underpaid from 2012 until termination, he is entitled to the difference between the amount paid per day or a monthly salary and the amount due to him under the Regulation of Wages (Agricultural Industry) Orders 2012 Legal Notice No. 70 dated 2<sup>nd</sup> July 2012 and Legal Notice No. 196 dated 30<sup>th</sup> July 2013.

**(g) 12 months' compensation for unlawful termination**

77. Having found that termination of the Claimant's employment contract was unfair and unlawful, the Claimant becomes eligible for the reliefs provided by Section 49(1)(c) of the Employment Act subject to compliance with Section 49(4) of the Act.

78. In assessing the quantum of compensation awardable to the Claimant for the unfair termination, the Court has taken into account the following:

- i) The Claimant was an employee of the Respondent for at least three years and wished to continue.
- ii) The Claimant did not appeal the decision of Mr. Michael. He simply walked away.
- iii) The Claimant substantially contributed to the dismissal.

79. In light of the foregoing the equivalent of three months' salary is fair.

80. In the upshot, judgment is entered for the Claimant against the Respondent as follows:

**(a) One month's salary in lieu of**

**notice Kshs.6,152.70**

**(b) Equivalent of three (3) months'**

**compensation Kshs.18,458.10**

**(c) Counsels for the Claimant and Respondent to compute the amount by which the Claimant was underpaid and file the same in Court within 30 days for adoption and or confirmation with or without any modifications.**

**(d) Costs of this suit.**

**(e) Interest at Court rates from the dates of judgment till payment in full.**

81. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF APRIL 2022**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**